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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Petition of U S WEST for Waiver of)
Sections 61.45(d), 61.46(d) and)
69.152 of the Commission's Rules)

CC Docket No. 97-149
CCB/CPD 98-7

AT&T OPPOSITION TO PETITION FOR WAIVER

Pursuant to the Commission's Public Notice, DA 98-224, released February 5, 1998, AT&T Corp. (AT&T) hereby opposes the petition for waiver filed by U S WEST Communications, Inc. (U S WEST) of Sections 61.45(d), 61.46(d) and 69.152 of the Commission's rules in order to allow it to impose End User Common Line Charges (EUCLs) on multiline business (MLB) customers in excess of the amounts prescribed by Section 69.152 (without reducing its Carrier Common Line (CCL) charges as required by Section 69.46(d)) and to make a corresponding exogenous cost adjustment to its Common Line basket price cap index (PCI).

AT&T opposes U S WEST's waiver request, which seeks to hold hostage its CCL refund obligation to interexchange carriers (IXCs) under the Commission's December 1, 1997 Memorandum Opinion and Order, FCC 97-403 ("1997 Annual Access Order") in this docket to the grant of a waiver that would allow U S WEST to make offsetting upward increases to its MLB EUCLs. Not only is U S WEST in flagrant noncompliance with the Commission's refund

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directive, but it has no right to the offsetting EUCL increases which it claims here.

Like Bell Atlantic (which had previously sought reconsideration on this issue),¹ U S WEST contends (at 5-6) that the 1997 Annual Access Order improperly requires it to refund carrier common line charges to IXCs based on a new method of allocating Common Line costs between IXC and end user customers. U S WEST concedes that if the Commission grants Bell Atlantic's reconsideration (which AT&T has previously shown it should not) then U S WEST's waiver request would become moot. Because the Commission has not acted on the Bell Atlantic reconsideration petition, U S WEST asks for a waiver (at 5) to recover amounts up to the cap imposed on its revenues in the Common Line basket, claiming that otherwise the Commission's rule would instead improperly limit its recovery to the difference between the cap and the refund ordered. U S WEST's contentions are meritless and its waiver request should be rejected.

As the Commission correctly found in the 1997 Annual Access Order (paras. 11-12, 22), accurate base factor portion (BFP) revenue requirement projections are vital to proper ratemaking because an inappropriately low

¹ See Public Notice, DA 98-16, released January 6, 1998, and AT&T's Opposition to Petitions for Reconsideration, CC Docket No. 97-149, CCB/CPD 98-1, filed January 21, 1998, at 4-9.

forecast of per-line BFP revenue requirements reduces the LEC's MLB EUCL and raises the per-minute CCLC, thus allowing the LEC, in most instances, to earn higher Common Line revenues than the price cap rules would otherwise permit.² Using a three-step statistical analysis, consisting of graph, nonparametric sign and mean tests, the Commission concluded that U S WEST underestimated its per-line BFP revenue requirement in a statistically significant manner in at least five of the last six years (*id.*, paras. 37, 41, 48) and that it had failed to adequately justify its BFP projections (*id.*, para. 66). On that basis, the Commission quite properly concluded that U S WEST's per-line BFP revenue requirement forecast for 1997/98 is likely to again show a downward bias (*id.*, paras. 66), and prescribed a BFP revenue requirement method, to ensure that its charges would be "just and reasonable," as required by Section 201(b) of the Communications Act.

As the Commission points out, in these circumstances, Section 205(a) of the Communications Act expressly empowers the Commission "to determine and prescribe what will be the just and reasonable charge, or

² Indeed, as AT&T demonstrated in its December 23, 1997 Petition against the price cap LECs' January 1, 1998 tariffs, using U S WEST as an example, a LEC's prior underforecasting of BFP revenue requirements allows the carrier to continue to earn higher common line revenues even after EUCL rates reach their caps. *Id.* at 3-6 and Exhibit CCL-Refund.

the maximum or minimum charge or charges." 1997 Annual Access Order (para. 75). Accordingly, it was entirely proper for the Commission to adopt a prescriptive approach for BFP revenue requirement forecasts for 1997/98 and to require U S WEST to issue refunds to IXC's who, based on its understated BFP forecasts, had paid inflated CCL charges during the July 1, 1997 to December 31, 1997 tariff period. *Id.*, para. 84.

U S WEST contends, however, that the effect of this prescription is to deny it the ability to charge higher MLB EUCLs for that period and that, as a result, its overall Common Line revenues will not be as high as they could otherwise have been. The short answer to this is that by having overcharged one set of ratepayers, namely IXC's, U S WEST is not entitled to recoup its losses from other customers. Offsetting upward adjustments claimed are not permitted by the Commission's order nor Commission policy.

As the Common Carrier Bureau specifically found, "The 1997 Access Tariff Investigation did not permit or require exogenous treatment of the price cap LEC's' past EUCL undercharges. Indeed, the Commission does not ordinarily allow carriers, at the end of a tariff investigation conducted under Section 204 of the Communications Act of 1934, as amended, to recoup past undercharges, or to offset revenues foregone from one rate element against refunds owed

for overcharges, absent unusual circumstances and prior notice to customers."³

Indeed, this situation is quite similar to the April 17 Order,⁴ against which Bell Atlantic also launched a baseless challenge. There the Commission had ordered Bell Atlantic to refund to its customers all amounts, plus interest, collected as a result of overcharges incurred in the Common Line basket during the course of the CC Docket 93-193 investigation. The procedure that the Commission established in the April 17 Order to compute the refund obligation allowed no other outcome but a downward exogenous adjustment. Notwithstanding this fact, Bell Atlantic computed what it believes customers "owe" to it, a procedure which the Bureau rejected.⁵

The Commission also rejected a similar attempt by carriers to offset refund obligations by asserted underpricing in other rates in the 800 Data Base Access

³ See In the Matter of Southwestern Bell Telephone Company, Transmittal No. 2683, Memorandum Opinion and Order, DA 98-173, released January 30, 1998, para. 13.

⁴ 1993 Annual Access Tariff Filing etc., CC Docket No. 93-193, Phase I, Part 2 and CC Docket No. 94-65, Memorandum Opinion and Order, FCC 97-139, released April 17, 1997, para. 38 ("April 17 Order").

⁵ Id., Memorandum Opinion and Order, DA 97-1326, released June 25, 1997, paras. 14-18 ("June 25 Order").

Tariff Order,⁶ and it should do so here.⁷ As the Bureau acknowledged,⁸ it is "longstanding policy that carriers cannot generally recoup past undercharges by prospective rate increases" (*citations omitted*). This is because, as the Supreme Court has explained, "[t]he company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must . . . shoulder the hazards incident to its actions including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate."⁹

Moreover, a subsequent increase in other rates would be prohibited retroactive ratemaking. When the Commission treats a rate as interim in nature and subject to

⁶ 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Service, CC Docket Nos. 93-129 and 86-10, Order on Reconsideration, FCC 97-135, released April 14, 1997, paras. 13-17 ("800 Data Base Access Tariff Order").

⁷ See also Federal Power Commission v. Tennessee Gas Transmission Co., 371 U.S. 145, 152 (1962) ("Tennessee Gas"); Belco Petroleum v. FERC, 589 F.2d 680, 687 (D.C. Cir. 1978) (prohibiting retroactive rate increases); Thornell Barnes Co. v. Illinois Bell Telephone Co., 1 F.C.C.2d 1247 (1965); MCI Telecommunications Corp. v. FCC, 59 F.3d 1407, 1419 (D.C. Cir. 1995) (no authority to order offsets to undercharges in a complaint proceeding); 800 Data Access Tariff Order, para. 17 and n.44; American Television Relay Inc., 67 F.C.C.2d 703 (1978) (offsets prohibited in tariff investigations).

⁸ June 25 Order, para. 15.

⁹ Tennessee Gas, 371 U.S. at 153.

"true-up" it does so explicitly,¹⁰ and there was no such FCC action here.

Accordingly, U S WEST's repeated forecasting errors should not result in unwarranted rate increases on end user customers. Indeed, if U S WEST has undercharged its end user customers due to its systemic BFP forecasting errors, it was a voluntary business decision, and U S WEST cannot claim that customers "owe" it. U S WEST is not guaranteed revenues up to its full Common Line basket PCI. By having systemically biased BFP projections that resulted in overstated CCL rates, it assumed the risk that, as the Commission quite properly ordered, it would be required to make refunds to IXCs without any ability to increase its EUCL rates to end users.

¹⁰ See Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access, 8 FCC Rcd. 8344, 8360 (1993); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No 96-98, First Report and Order, FCC 96-325, released August 8, 1996, para. 1067.

Wherefore, the Commission should deny U S WEST's
petition for waiver and require U S WEST to proceed
forthwith with its CCL refund obligation under the
1997 Annual Access Order.

Respectfully submitted,

AT&T CORP.

By /s/

Judy Sello
Mark C. Rosenblum
Peter H. Jacoby
Judy Sello

Its Attorneys

Room 3245I1
295 North Maple Avenue
Basking Ridge, New Jersey 07920
(908) 221-8984

March 9, 1998

CERTIFICATE OF SERVICE

I, Viola J. Carlone, do hereby certify that on this 9th day of March, 1998, a copy of the foregoing "AT&T Opposition to Petition for Waiver" was served by U.S. first class mail, postage prepaid, to the parties listed below.

Robert B. McKenna
Richard A. Karre
U S WEST Communications, Inc.
Suite 700
1020 19th Street, N.W.
Washington, DC 20036

Viola J. Carlone
Viola J. Carlone